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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1004

FRANKLIN PEANUT COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

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INDEX.

Subject Index.

Page

Petition for writ of certiorari

Summary statement of the matter involved..... 2
Questions presented 4
Reasons relied on for the allowance of the writ.... 4
Prayer for writ 5

Brief in support of petition:

Opinions below 7
Jurisdiction 7
Statement of the case (see summary statement of the matter involved 8
Statute involved 8
Specification of errors..... 10
Summary of argument 11
Argument 11
Conclusion 19

LIST OF AUTHORITIES CITED.

Cases.

Anniston Mfg. Co. v. Davis, 301 U. S. 337.....4, 14
Arkwright Mills v. Commissioner, 127 F. (2d) 465....14, 18
Cudahy Packing Co. v. U. S., 126 F. (2d) 429..... 12
Dobson v. Commissioner of Internal Revenue, 320 U. S. 489.....11, 19
Republic Cotton Mills v. Commissioner, (CCA-4, 1-31-45; 1945 Prentice Hall Federal Tax Service para. 72362) 15
Webre Steib Company, Ltd. v. Commissioner of Internal Revenue, — U. S. — (2-12-45; 13 LW 4199)..5, 16

Statutes.

Sec. 510 of the Revenue of the 1942..... 2
Sec. 240 (a) of the Judicial Code, (ch. 229 43 Stat. 936) 8
Sec. 902 and 907 of the Revenue Act of 1936..... 8

Senate Report.

Senate Report No. 2156 of the Committee on Finance.. 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Franklin Peanut Company, a partnership, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the foregoing cause, wherein said Circuit Court of Appeals affirmed a decision of the Tax Court which denied petitioner a recovery of processing taxes theretofore paid.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner herein, sometimes designated the taxpayer, was engaged in the business of cleaning, grading and shelling peanuts, and as such, was a processor within the intent and meaning of the Agriculture Adjustment Act, during the taxing period November 1, 1934 to April 30, 1935. While the effective date of the processing tax of 1¢ a pound on peanuts was October 1, 1934, petitioner did no processing until November 1934, and did not incur a tax liability until that time. Processing taxes were paid by petitioner for the period November 1, 1934 to April 30, 1935.

When the processing tax was declared unconstitutional, a timely claim for refund was duly filed by the taxpayer, and upon its rejection in full by respondent, a petition for review of said disallowance was filed with the Processing Tax Board of Review. Hearings were had and evidence was taken before said Board which prepared Recommended Findings of Fact and Decision adverse to petitioner, but before said Findings and said Decision were formally adopted or promulgated by the Board, said body was abolished by Sec. 510 of the Revenue Act of 1942, and its functions transferred to the Tax Court.

The Tax Court, without material changes, adopted the aforesaid Recommended Findings and Decision (R. 247) and entered judgment against the taxpayer. This judgment has been affirmed by the Circuit Court of Appeals, Fourth Circuit, (R. 274-281).

In the disposition of this case, the Tax Court with the subsequent approval of the Circuit Court of Appeals, fell into error, as a matter of law, in ignoring the testimony of petitioner's three economic and statistical experts, in excluding certain expert testimony, in disregarding other evidence as to economic factors, and *in failing to make any findings whatsoever with respect thereto.* Petitioner's evidence dealing with said matters was not controverted and

the respondent failed to produce even one witness in rebuttal.

By subpoena petitioner called as witnesses two economic and statistical experts employed by the Department of Agriculture for the purpose of having them testify regarding taxpayer's alleged shifting to vendees of the burden of the processing tax. Each such witness was eminently qualified, having devoted many years to the study of the economic aspects of the peanut industry. In addition, petitioner produced as a witness, for the purpose of having him testify upon the same subject, a member of the largest exclusively peanut brokerage firm in the United States.

Mr. Gustave Burmeister, one of the economists of the Agricultural Department, testified that factors other than the processing tax were responsible for the margins during the tax year, and that said tax was not an element in determining sale prices. (R. 197). The other specialist from the Department, Mr. Harold J. Clay, who was admitted by government counsel to be an expert (R. 117) testified that the processing tax added no more than 4/10ths of a cent to the average price of peanuts during the period, and hence that said 4/10ths of a cent a pound was the maximum amount of tax which petitioner could have shifted to others, (R. 156); but the presiding member of the Board of Review actually ruled out this testimony and refused to consider same in the case (R. 153-154). The third witness, Mr. Robert J. Speer, was of the opinion that petitioner might have shifted as much as 50% of the tax in controversy.

Also, we search the record in vain for any Findings with respect to other important economic factors—there is substantial evidence in the record regarding them—such as the large deficiency during the tax period in the available supply of animal fats and vegetable oils; the peanut diversion program, with its subsidized payments for peanuts diverted to oil; the increased consumer demand, brought on in part by governmental expenditures for recovery and relief and by generally increased purchasing power of consumers.

The statutory marginal presumption in this case is adverse to petitioner, but upon the introduction by petitioner of other evidence, hereinabove outlined, said presumption became inoperative. Said other evidence has obviously not been considered by the Tax Court since no Findings whatsoever have been made with respect thereto.

QUESTIONS PRESENTED.

1. Whether petitioner is entitled to a refund of unconstitutional processing taxes heretofore paid, upon the basis of the showing made before the Tax Court.

2. Whether, in reaching a conclusion with respect to question 1 supra, it was proper or permissible for the Tax Court to exclude certain expert testimony and to fail utterly to make Findings with regard to the only testimony upon which petitioner could hope to prevail in the litigation, it being admitted that the margin computation was adverse to the taxpayer.

3. Whether it was proper for the Circuit Court of Appeals to indulge the presumption that the Tax Court had considered certain evidence as to the economic burden when it is clear that no Findings whatsoever had been made with respect thereto.

4. Whether, the statutory presumption based on margin computations having become inoperative, there remained in the case substantial evidence which, when properly weighed, could support the conclusion that petitioner absorbed none of the tax.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, Fourth Circuit, has made a decision in the case at bar which is in conflict with a decision of this Honorable Court, to wit, *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

In the case last cited it is apparent that the Tax Court, just as other administrative bodies, must, as an indispensable requirement in its procedure, base its decision upon its Findings and that its Findings must be based upon the evidence. The Supreme Court said (p. 356):

> "The board which makes its Findings and renders its decision *must* consider the evidence and base its Findings and decision upon it." (Italics ours).

In failing and refusing to make any Findings of Fact covering the economic factors and the opinions of skilled economists with respect to the incidence of the tax, the Tax Court is flying in the face of the quoted language of the United States Supreme Court. This alone is reversible error.

2. The statutory presumption against the taxpayer, based on margin computations, having become inoperative under *Webre Steib Company Ltd.* v. *Commissioner of Internal Revenue*, — *U. S.* — (2-12-45; 13 LW 4199), the principal ground upon which the Circuit Court of Appeals based its decision no longer exists.

The case at bar was decided prior to *Webre Steib* v. *Commissioner of Internal Revenue*, supra. It is clear under said decision of the Supreme Court that the presumption against petitioner became inoperative upon the introduction by the taxpayer of other evidence. Said other evidence was never given the weight to which it was entitled because the lower Court considered the adverse presumption as continuing. Had it been given its proper weight and if that weight had been expressed in Findings of Fact, the result would have been favorable to the taxpayer.

PRAYER.

For the foregoing reasons, which are developed in some detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Fourth Circuit to the end that the above entitled cause may be re-

viewed and determined by this Court; that the final order of said Circuit Court of Appeals be reversed and that petitioner be granted such other and further relief as is proper.

Respectfully submitted,

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Counsel for Petitioner.

Colladay, Colladay & Wallace,
Of Counsel.
Dated: March, 1945.

IN THE

Supreme Court of the United States

October Term, 1944.

No. ——

FRANKLIN PEANUT COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The "Memorandum Findings of Fact and Opinion" of the Tax Court is unreported, but is found in the record at p. 247 et seq.

The opinion of the Circuit Court of Appeals for the Fourth Circuit appears in 144 F. (2d) 979, (R. 274 et seq).

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals here sought to be reviewed was entered August 26, 1944 (R. 281). The petition for rehearing was denied October 2, 1944 (R. 292). By appropriate order entered December 9, 1944 (R.

294) this Court extended to and including March 2, 1945 the time allowed for filing petition for writ of certiorari.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (ch. 229 43 Stat. 936).

III.

STATEMENT OF THE CASE.

A summary statement of the facts is given in the petition, supra p. 2, 3.

IV.

STATUTE INVOLVED.

REVENUE ACT OF 1936:

"SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be——

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly * * * in any manner whatsoever.

"SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin

during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

* * * * * * * * * *

(c) The 'tax period' shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The 'period before and after the tax' shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

* * * * * * * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to——

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include

any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;"

V.

SPECIFICATION OF ERRORS.

It is submitted that the Court below erred:

1. In affirming the decision of the Tax Court, thereby denying to petitioner recovery of an unconstitutional tax theretofore paid.

2. By indulging in the presumption that the Tax Court had considered certain evidence with respect to which there is an utter absence of Findings.

3. By approving the failure of the Tax Court to make adequate Findings with respect to all testimony and other evidence adduced at the trial of the case.

4. By basing its conclusion largely upon the inoperative statutory marginal presumption, without any indication that the controversy had been decided by weighing *all* the evidence rather than by relying principally on margin computations.

VI.

SUMMARY OF ARGUMENT.

A.

In deciding the controversy herein, the lower courts have ignored the economic theories underlying the alleged shifting of the tax burden. Evidence of the economic burden is the only evidence upon which the taxpayer could possibly hope to win the case, since petitioner admitted the adverse margin and then proceeded to rebut by introducing expert and other direct evidence.

B.

When the presumption, based on margin computations became inoperative as it did, there was left in the case no evidence sufficiently substantial to support the ultimate finding that petitioner shifted the entire tax burden.

C.

The case of *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, does not preclude an adequate review of the decision below in this case since the underlying factors in the two cases are entirely different.

VII.

ARGUMENT.

A.

Petitioner feels very strongly that it has not had its day in Court. So much has been omitted from the Findings below as to convince one that the Tax Court did not consider the only evidence upon which petitioner could hope to prevail in this litigation. Said Findings were inadequate for a full and complete review on appeal.

The foregoing omission of adequate Findings can doubtless be attributed to the fact that the entire record in this case was made before the Board of Review, rather than be-

fore the Tax Court itself. The case of this petitioner is one of those which unfortunately was caught in the transitional period when the Board of Review was abolished and its functions and jurisdiction transferred to and vested in the Tax Court. Prior to the abolition of said Board, the member who heard the case had prepared Recommended Findings of Fact and Decision based upon the testimony and evidence adduced at the trial, lasting five days. The transcript of the testimony covered 759 pages, and in addition there were numerous exhibits. It is significant, we think, that the Memorandum Findings of Fact and Opinion of the Tax Court correspond almost verbatim with the Recommended Findings of Fact and Decision of the Board of Review. In fact the opinion of the Tax Court which comprises one paragraph is a mere restatement of the last finding made by the member of the Board of Review who presided at the hearing.

The Tax Court, with the present approval of the Circuit Court of Appeals, has adopted and pursued an entirely erroneous approach to the problem here presented in this litigation, in that said Tax Court has not only ignored the economic theories underlying the alleged shifting of the processing tax, but has wholly failed to make any findings of fact with respect to the economic factors bearing upon that question. It can no longer be disputed that the governing statute requires the taxpayer to prove that it had not shifted the burden of the tax in the economic rather than in the legal sense. It is this economic burden which, to date, has been ignored in the consideration of this case.

This very question of economic burden was considered by the United States Circuit Court of Appeals, Seventh Circuit, in *Cudahy Packing Co.* v. *U. S.*, 126 F. (2d) 429, from which the following is quoted (p. 431)

> "* * * it seems clear that the burden referred to was the economic burden, for otherwise the question of impossibility of proof could not have arisen."

* * * *

"Admittedly, the shifting of the burden in the legal sense is included in §902, but it does not follow therefrom that the burden, in its broader compass of the economic sense, was thereby to be eliminated."

* * * *

"Although the phrase 'economic burden' is not used in the section, any other interpretation of the word burden would do violence to the language and purpose of the section."

* * * *

"There is no doubt that the shifting of the burden in the economic sense requires more exhaustive and difficult proof than the legal test. The measure is not confined merely to acts of the taxpayer; it rests in the economic forces at play, forces over which the average individual has little, if any, control. One force, to be sure, may be the tax, but that makes no less real the other economic forces contributing to the resultant."

That the Seventh Circuit was wholly correct in its views in indicated beyond peradventure by Senate Report No. 2156 of the Committee on Finance, pp. 32-34, 74th Cong. 2nd Sess. from which the following is quoted:

"Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden."

* * * *

"The question as to whether processing taxes were passed on, however, involves extremely complicated economic and accounting considerations."

As the case at bar stands today, the decision which has been reached is based upon superficial surface indicia which are hereinafter adverted to, rather than upon economic considerations.

Even the Circuit Court of Appeals, as is apparent from its opinion (R. 280), is convinced that *all* the evidence ad-

duced from experts and other competent sources was not considered below by the presiding officer of the Processing Tax Board; at best, "most" of said evidence was so considered. But there is no showing whatsoever that said evidence, dealing with economic factors and with alleged shift of economic burden, was considered by the Tax Court, which body, rather than the Processing Tax Board, actually decided the issue below. And in the absence of such a showing, the Court says it "must be presumed" (R. 280) that the Tax Court also considered said evidence or such portion thereof as was considered by its predecessor in the case, the Processing Tax Board. We submit, however, that there is no reasonable basis for such a presumption. Rather the reverse is true.

Undoubtedly, the extent to which evidence was considered, is to be determined by the Findings of Fact, and no findings were made below by either the Tax Court or Processing Tax Board with respect to the economic factors or the alleged shift in economic burden, as testified to by two government economists and by another well versed in his field. That economic factors are properly to be considered for the purpose of showing what a taxpayer's margin would have been in the absence of a processing tax, other factors remaining the same, has been decided by the Circuit Court of Appeals, Fourth Circuit, in *Arkwright Mills* v. *Commissioner*, 127 F. (2d) 465.

The conclusion of the Tax Court is a conclusion made upon facts not found. An indispensable requirement in the procedure of all administrative bodies such as the Tax Court is that its decision must be based upon its findings and that its findings must be based upon the evidence. This requirement is stated by the Supreme Court in the following language, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 357:

> "The Board which makes its findings and renders its decision *must* consider the evidence and base its findings and decision upon it, * * *". (Italics ours).

In failing and refusing to make adequate Findings of Fact, covering fully the economic factors and the opinions of skilled economists with respect to the incidence of the tax, the Tax Court is flying in the face of the quoted language of the United States Supreme Court. This alone is reversible error.

In an endeavor to show that the Tax Court considered the economic factors and the expert testimony in spite of its failure to make findings with respect thereto, respondent attached to its brief below as Appendix C (R. 256-271) a memorandum which had been prepared by Member Hathcock of the Processing Tax Board. Said memorandum was neither a finding nor an opinion and is not entitled to the dignity of either. It was obviously meant to perform the office of a brief in support of the recommended findings and decision of said member. It was dated July 31, 1942, whereas the Findings of Fact and Opinion of the Tax Court, which actually decided the case below, were dated August 27, 1943, more than twelve full months later. There is nothing in the record whatsoever to indicate that said memorandum of Member Hathcock was considered or even ever seen by Judge Van Fossan to whom this case was assigned by the Tax Court at the time when the Board of Review was abolished and its jurisdiction and functions transferred to the Tax Court of which Judge Van Fossan was a member.

As a matter of fact the criticisms of petitioner's position, as set forth in Member Hathcock's memorandum were directed at an earlier brief which had been filed by petitioner with the Board of Review. As a result of said criticisms petitioner was able, in filing its subsequent brief with the Tax Court, to eliminate alleged imperfections in its theory and its mathematical computations.

The factors here presented are not unlike those present in *Republic Cotton Mills* v. *Commissioner*, (CCA-4, January 31, 1945; 1945 Prentice Hall Federal Tax Service ¶72362) wherein the Circuit Court of Appeals in reversing the Tax Court had the following to say:

"The presiding officer of the Board filed recommended findings of fact in extenso and a recommended decision adverse to the claims without opinion or discussion; and the case was argued before the Board. But the Board was abolished before rendering a decision, and the case was then submitted to the Tax Court on the records and briefs. The court adopted, with slight modifications, the findings recommended by the presiding officer of the Board and filed a brief opinion wherein, without dicussion of its findings of fact or their bearing on the matter in dispute, it rejected the claim for refund in toto."

* * * *

"* * * but the court deemed it unnecessary to discuss these contentions or to determine the precise weight to be given to each of the factors advanced, and merely said that their aggregate weight was insufficient to convince them that the claimant bore the burden of any part of the processing tax which it had paid."

* * * *

"In so doing the court may not confine itself to a consideration of the prima facie effect of the statutory margins under § 907(a), for § 907(c) provides that the presumption established by subsection (a) may be rebutted by proof of the actual extent to which the claimant shifted the burden of the tax."

* * * *

"* * * all the evidence should be weighed and considered which is pertinent to the contention that the claimant bore the burden of a part of the tax which it paid."

The case should be remanded for adequate findings and for consideration of the foregoing factors.

B.

Margin computations in this case, considered alone, give rise to a presumption adverse to the taxpayer. This has been consistently admitted by the taxpayer from the very beginning; but the proof introduced by petitioner made that presumption inoperative. *Webre Steib Company,*

Ltd. v. *Commissioner*, — U. S. — (2-12-45; 13 LW 4199). In turn, this made it necessary for the Court below to weigh all the evidence generally relevant on the issue of whether the tax burden was shifted. There being no findings as to said other evidence of economic burden, it is obvious that there has in fact been no weighing of all the evidence.

Upon elimination of the aforseaid presumption, there were left in the case certain factors such as (R. 280) a greater net income for 1935, rubber stamp impressions regarding the shifting or absorption of the tax, an increase in sales price, and treatment of the tax as an item of cost, all of which factors when properly considered are not sufficiently substantial to support an ultimate finding wholly adverse to the taxpayer.

As to net income for 1935, this is of little or no assistance to the government or to the taxpayer in deciding the question of shift, for the reason, among others, that the tax here in controversy covers two months in 1934 and four months in 1935, whereas the income tax returns for Franklin Peanut Company reflect income for whole calendar years. There is no way of telling from the record in what part of the year the income was made or lost, or whether said income was derived from processing or from speculation. While, as stated by the Circuit Court of Appeals (R. 276) the highest net income for any year prior to 1935 back to 1919, "reported" by the taxpayer was $55,582.08, the highest net income of the taxpayer, as finally determined, for any one year during that period was $81,477.60. The increase in 1935 over the figure last stated is certainly attributable in large measure to the increased efficiency of the taxpayer's new plant. Furthermore, the average annual income of petitioner for the decade 1919-1928 was $45,095.12, whereas the corresponding figure for the decade 1929-1938, which includes the tax period, was only $40,380.50 (R. 203). Surely this lesser income in the tax decade proves that petitioner did not shift the tax but bore the economic burden thereof.

As to stamp impressions, it is well settled that whether a tax burden is absorbed or shifted must be judged by what happened, not by what was hoped for. As said in *Arkwright Mills* v. *U. S.*, 49 F. Supp. 970, affd. 139 F. (2d) 454 (CCA-4), "* * * what was meant or said or understood is not the test of whether a tax burden was shifted." In that case it was declared that the expression "price includes tax" does not mean that the economic burden was shifted to others. It is significant that the prices charged by petitioner were no different whether stamp impressions were or were not used. The test is the economic difference between what a seller would have realized if there had been no tax, and what he did realize after becoming liable for the tax.

As to increases in sales price, the Tax Court found that on the effective date of the processing tax, petitioner increased its prices by an amount "substantially equal" (R. 250) to the processing tax of one cent per pound. It was developed on cross examination that the increase amounted to only ¾ths of a cent per pound (R. 219-220). Certainly ¼th of the principal amount of tax here in dispute is substantial, and the testimony relied on by respondent does not support the finding made by the Court. Since the taxpayer incurred and paid no processing taxes until November 1, 1934, and since its price increase, whatever its amount, was made October 1, 1934, it is certain, it seems to us, that said increase could not possibly have included *any* tax.

As to treatment of the processing tax as expense, the retort is—how could Franklin Peanut Company have treated it otherwise since it paid the tax? The question as to whether a disbursement made in this manner can properly be looked upon as shifted to others, is a question to be answered by economists. The latter were asked regarding this and they made definite responses as the record definitely indicates. Failure of the Tax Court to make specific findings with respect thereto, is reversible error.

It should also be noted that at no time did petitioner bill the tax separately and that, in contrast to the practice of

its competitors, the taxpayer never agreed to refund any portion of the tax to its vendees. The Tax Court's Findings do not cover these factors. That Court did find that brokers reduced their commissions charged petitioner in order "* * * to help petitioner bear the processing tax * * *" (R. 250). Obviously, this finding which was noted, but without comment, by the Circuit Court of Appeals (R. 277) is wholly at variance with the ultimate finding that petitioner did not bear any part of the processing tax.

C.

The Court below placed strong reliance upon *Dobson* v. *Commissioner*, 320 U. S. 489 (R. 278). But the situation in the *Dobson* case and in that at bar are entirely different, and the reasons for the decision in the former are absent in the latter. In *Dobson*, there were adequate and complete Findings, the ultimate conclusion being obviously based upon consideration of all the evidence. The reverse is true here. The *Dobson* case was decided by an "administrative body having special competence to deal with the subject matter," (p. 502) whereas the Findings in petitioner's case were drafted by an employee of the Treasury Department, a member of a Board later abolished.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is submitted that a writ of certiorari should issue.

Respectfully submitted,

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Dated: March, 1945.

No. 1004

In the Supreme Court of the United States

OCTOBER TERM, 1944

FRANKLIN PEANUT COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337, rehearing denied, 302 U. S. 772	10
Commissioner v. *Scottish American Co.*, 323 U. S. 119	12
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231	12
Helvering v. *Stock Yards Co.*, 318 U. S. 693	12
Webre Steib Co. v. *Commissioner*, decided February 12, 1945	11, 12
Statutes:	
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 902 (7 U. S. C. 644)	9, 14
Sec. 906 (7 U. S. C. 648)	8, 9
Sec. 907 (7 U. S. C. 649)	9, 15
Revenue Act of 1942, 56 Stat. 798, sec. 510	9

636175—45——1

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OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 247–251) are unreported; the opinion of the Circuit Court of Appeals (R. 274–281) is reported at 144 F. 2d 979.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 26, 1944. (R. 281.) A petition for rehearing was denied October 2, 1944. (R. 292.) On order of this Court dated December 9, 1944 (R. 294), the time for filing a petition for writ of certiorari was extended to and including

March 2, 1945. The petition for a writ of certiorari was filed on March 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Section 902 of the Revenue Act of 1936, the petitioner established that it bore the ultimate burden of any part of the processing tax.

STATUTES INVOLVED

The pertinent statutes are set forth in the appendix, *infra,* pp. 14–20.

STATEMENT

The facts found by the Tax Court (R. 247–251) are as follows:

During the tax period involved herein petitioner was a partnership, composed of R. I. Beale, J. C. Beale, J. I. Beale, Jr., and Cyrus W. Beale, with its principal place of business at Franklin, Virginia. Since about 1904 petitioner had engaged in the business of cleaning, grading, and shelling peanuts, and of selling processed peanuts to wholesalers and jobbers of peanuts throughout the United States. Petitioner was a processor within the intent and meaning of the Agricultural Adjustment Act during the period from October 1, 1934, to April 30, 1935, inclusive, and during that period paid tax on the processing of peanuts in the total amount of $116,721.29. (R. 247.)

A timely claim for the refund of the $116,-721.29 paid as tax on the processing of peanuts was filed, and a notice of disallowance in whole of this claim was sent to the petitioner by registered mail on April 22, 1940. A petition for the review of the disallowance was filed on July 20, 1940, with the Processing Tax Board of Review, whose duties were subsequently taken over by the Tax Court. (R. 247–248.)

During the tax period and during the statutory period before and after the tax, petitioner purchased principally Virginia type bunch peanuts; small quantities of Spanish type peanuts were also handled. Some of the peanuts were sold cleaned but not shelled, graded as Jumbos, Fancies, and Extras. Shelled peanuts were sold graded as Extra Large, Virginia No. 1, Virginia No. 2, Spanish No. 1, and Spanish No. 2. Some peanuts were also sold as oil stock. For the tax period petitioner's sales, exclusive of oil stock, according to grades of peanuts, were as follows (R. 248):

	Pounds	Amount	Average sale price per pound
Peanuts cleaned but not shelled:			
Jumbos	814,585	$56,296.44	$0.0691
Fancies	1,114,366	69,199.97	.0621
Extras	790,897	44,150.70	.0558
Shelled peanuts:			
Extra Large	1,887,346	176,620.14	.0936
Virginia No. 1	3,442,292	278,706.90	.0810
Virginia No. 2	1,277,756	89,926.33	.0704
Spanish	170,436	13,374.65	.0785
Total	9,497,678	728,275.13	

The total number of pounds of peanuts processed during the tax period (farmers' stock weight) was 11,672,129. The total cost of these peanuts was $522,177.88, and the total gross sales value of the processed peanuts was $734,815.30. The average margin per pound of peanuts processed during the tax period was $.0082175. (R. 248.)

The total number of pounds of peanuts processed during the period before and after the tax (farmers' stock weight) was 52,548,423 pounds. The total cost of these peanuts was $1,425,681.14, and the total gross sales value of the processed peanuts was $1,744,947.58. The average margin per pound of peanuts processed during the period before and after the tax was $.0060757. (R. 248.)

The average margin for the tax period was higher than the average margin for the period before and after the tax by $.0021418 per pound; the presumption under Section 907 (a) of the Revenue Act of 1936 is, therefore, that none of the burden of the processing tax paid by petitioner was borne by it but that the entire burden of the tax was shifted to others. (R. 248–249.)

Petitioner reported a net income in its federal partnership return of income for each of the calendar years indicated, as follows (R. 249):

Year:	*Net income*
1932	$6,615.00
1933	22,319.33
1934	27,626.81
1935	40,750.53
1936	20,681.60

The net income reported for the year 1934 was in the amount of $27,626.81, after a deduction of $48,186.30 for processing tax paid with respect to the processing of peanuts within that year. The net incomes reported for the years 1935 and 1936 were revised by a revenue agent of the United States Bureau of Internal Revenue to $119,770.72 and $23,211.85, respectively, and these findings of the revenue agent were accepted as correct by petitioner's president and general manager, who was also a partner. The revised net income for 1935 was $119,770.72, after a deduction of $68,534.99 for processing tax paid with respect to the processing of peanuts within that year. (R. 249.)

Typical invoices indicate that on the effective date of the processing tax petitioner increased the sales prices of its peanuts by an amount substantially equal to the amount of the processing tax, and that immediately after January 6, 1936, when the taxing provisions of the Agricultural Adjustment Act were held to be unconstitutional, petitioner reduced the sales prices of its peanuts by an amount substantially equal to the amount of the processing tax. (R. 250.)

Petitioner, in its accounting, treated the processing tax as an item of cost, the same as the cost of peanuts, the cost of production, etc., and fully recovered the processing tax in the same manner that it recovered all other items of cost. (R. 250.)

At least 50% of petitioner's sales of peanuts were made through brokers. With respect to each such sale petitioner deducted the amount of the processing tax applicable thereto from the gross invoice price before computing the broker's commission. (R. 250.)

Beginning sometime about February, 1935, it became the practice of petitioner to stamp upon contracts entered into between it and its customers for the sale of peanuts the following language (R. 250):

> The present Processing Tax as levied by the United States Government is included in the price shown on this order, but any increase in this tax, or any other tax that may be levied by either the Federal or State Government that increases the cost of goods on this order shall be for account of buyer, and added to price herein stated.

Prior to the use of a stamp it had been the practice of petitioner to type similar provisions upon its contracts of sale of peanuts with respect to the processing of which a tax had been paid, and on many of its invoices statements as follows, or to the same effect, were either typed or stamped (R. 251):

> The processing tax has been included in the price on this shipment.
>
> * * * * *
>
> The present processing tax as levied by the United States Government is included in the price shown on this invoice.

Otherwise, petitioner represented to its customers by telephone and by letters that the prices paid by them for peanuts included the processing tax, the following typical reply having been made to a customer who inquired relative to the inclusion of the processing tax in the invoice prices of peanuts shipped to the customer during the tax period (R. 251):

> We do not see where it is necessary for us to put the certificate as outlined in your letter on each invoice covering peanuts we ship you. The peanuts we are shipping includes the Processing Tax of 1½¢ lb. on shelled peanuts and 1.05¢ lb. on peanuts in the shell. We pay 1¢ lb. tax on farmers' stock when we use them and the conversion figures are as mentioned above. When the tax on peanuts we use is due we pay same.

The Tax Court concluded that the evidence did not establish that the petitioner bore the burden of any part of the processing tax paid by it during the period October 1, 1934, to April 30, 1935, inclusive, and accordingly denied recovery. (R. 251.) The Circuit Court of Appeals for the Fourth Circuit affirmed. (R. 275–281.)

ARGUMENT

This case does not warrant further review. The decision of the Circuit Court of Appeals, affirming that of the Tax Court, was correct and there is no conflict among the circuits.

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The gravamen of petitioner's complaint (Br. 11) is that it has not had its day in court, the principal contention being that the failure of the Tax Court to make findings with respect to much of the evidence which petitioner adduced in an effort to prove that it absorbed the processing tax, shows that such evidence was given no consideration, and that this is fatal to the decision below. We think, however, that there is no basis for this argument.

The case at bar was tried (R. 247) before a member of the Processing Tax Board of Review pursuant to Section 906 of the Revenue Act of 1936, which established that Board and prescribed its procedure; subsection (e) of that section provides, *inter alia*, that the Board member assigned to conduct a particular hearing—

> shall recommend findings of fact and a decision to the Board * * * after the conclusion of the hearing.

In accordance with this mandate, Board Member Hathcock, who presided here (R. 271), made his findings of fact and, at the close of the proceedings, entered his recommendation to the Board of Review, that decision be entered sustaining the Commissioner's determination that petitioner had borne no part of the processing tax. In addition, Member Hathcock filed an accompanying memorandum in which he exhaustively analyzed and evaluated the petitioner's evidence, including the critical testimony of its witnesses; that memo-

randum appears at pages 256–271 of the record. The substance of the memorandum was that petitioner's evidence was so unsubstantiated and inadequate as to have absolutely no probative value either in rebutting the statutory presumption of shift[1] or in proving, as petitioner had the burden of doing,[2] that it actually bore the burden of the tax.

As was its right under Section 906 (c), *supra*, petitioner filed a brief with the Board of Review in respect of the presiding officer's recommendations, as did the Commissioner, and the case was thereupon submitted. However, while it was pending for decision before the Board of Review, that body was abolished and its functions were transferred to the Board of Tax Appeals by Section 510 of the Revenue Act of 1942. Subsection (c) of that section specifically provides that proceedings pending before the Board of Review on December 31, 1942 (of which the instant case was one), "shall be deemed pending in and be transferred forthwith to the Board of Tax Appeals" and further that they "shall be proceeded with and disposed of by the Board of Tax Appeals as if originally begun therein." Subsection (d) states that all the files, records, etc., of the Board of Review "shall be transferred" to the Board of Tax Appeals. It is apparent from

[1] Section 907, Revenue Act of 1936, Appendix, *infra*.

[2] Section 902, Revenue Act of 1936, Appendix, *infra*.

subsections (c) and (d) that the Tax Court had full access here to the memorandum of Board Member Hathcock as well as to the findings and decision which he recommended and the evidence on which it was based; it is clear from subsection (c) that the Tax Court was not required to rehear the case, but that it was expressly authorized, as it did, to dispose of it on the record as theretofore made.

The recommended factual findings of Member Hathcock are not in the record, but we do not question petitioner's statement (Br. 12) that the Tax Court opinion—

> is a mere restatement of the last finding made by the member of the Board of Review who presided at the hearing.

This does not show, however, that the Tax Court ignored petitioner's evidence. It would seem rather to establish that the Tax Court had, in its review of the Board member's advisory findings, surveyed also his accompanying memorandum, and that the Tax Court, checking the memorandum against the record, had come to the same conclusion with respect to the lack of any probative value in petitioner's evidence. And if the Tax Court shared the view of the presiding Board member that the petitioner's "evidence" was not persuasive, it was not required to make formal findings to that effect. Clearly, *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, rehearing

denied, 302 U. S. 772, on which petitioner relies, does not so hold.

Petitioner also argues (Br. 15) that the memorandum, being neither a finding nor an opinion, is itself valueless and must be ignored. However, petitioner has not previously made any objection to its being considered; and it is clear from the opinion below (R. 280) that the Circuit Court of Appeals regarded the existence of the memorandum and its contents as pertinent to the issue of whether the petitioner's evidence had received due consideration by the Tax Court.

Petitioner contends (Br. 16–19) that under the decision in *Webre Steib Co.* v. *Commissioner*, decided February 12, 1945, the statutory presumption became "inoperative" here on introduction of petitioner's proof. However, in its opinion in the *Webre Steib* case, this Court made no attempt to explore the question of what evidence is necessary to rebut the presumption when, as here, it operates in favor of the Government. The Court held only that in a case where the presumption operated in favor of the Government the effect of the presumption could not be to place on the claimant the burden of going forward with the evidence, for he had that burden anyway as well as the burden of proof. And it is the latter burden which is decisive here. The Tax Court did not base its decision upon the presumption created by the margin comparison;

its opinion (R. 251) clearly shows that it was the presumption of correctness attending the Commissioner's determination to which it gave heed, holding that that presumption had not been overcome by the petitioner's evidence. Furthermore, the opinion states affirmatively (R. 251) that decision against the petitioner was compelled by its failure to establish on the evidence that it absorbed any part of the processing tax—in other words, the petitioner did not carry its burden of proof under Section 902.

To be sure, the unfavorable margin comparison was evidence negativing the petitioner's claim, irrespective of its force as a presumption; very probably the Tax Court, and certainly the Circuit Court of Appeals (R. 280), considered it one of the evidentiary factors in the case. But such treatment was given express sanction by this Court in the *Webre Steib* case. In our view the case involved analyzing and weighing the evidence; and since the court below found the Tax Court to have done so under correct principles of law, its decision was entitled to affirmance. *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231; *Helvering* v. *Stock Yards Co.*, 318 U. S. 693.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3)

in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 644.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The mar-

gin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall

be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unity of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after

the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing

that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. * * *
(7 U. S. C. Sec. 649.)

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